No. 2959

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF BOZEMAN, a Corporation, JOHN A. LUCE, Mayor of the City of Bozeman, and C. A. SPIETH, City Clerk of the City of Bozeman,

Appellants,

vs.

SWEET, CAUSEY, FOSTER & COMPANY, a Corporation, JAMES N. WRIGHT & COMPANY, a Corporation, and C. W. McNEAR & COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLANTS.

H. D. KREMER,
GEORGE Y. PATTEN,
Solicitors for Defendants and Appellants.

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BRIEF OF APPELLANTS.

This is a suit in equity to compel the appellants to return two certified checks aggregating $4,000, deposited as earnest money on the purchase by appellees of certain municipal bonds. The bonds in controversy consist of an issue of the City of Bozeman of water works bonds aggregating $235,000, and sewer bonds aggregating $70,000. The bill of complaint, as filed (Record, p. 2), was one for an injunction to restrain the city from selling and delivering to others than the appellees the issue of bonds sold by appellants to appellees, if the bonds were to be held valid, or from negotiating or cash-

ing the certified checks aggregating $4,000, if they were held to be invalid. The application for a temporary injunction against the sale of the bonds was denied, and the appellants were directed to hold the checks for the final hearing, which was done. After the hearing on the temporary injunction, and prior to the trial, the appellant City of Bozeman sold the bonds to James A. Murray of Butte, the appellees having refused to take them. The question of enjoining the sale of the bonds has, therefore, been eliminated from the case.

Both the water works bonds and sewer bonds were issued pursuant to the authority of a special election held at the same time as the general election for the City of Bozeman, on the 3d day of April, 1916. Separate notices of election were given, which were identical in terms except in their descriptions of the denominations and amounts of the bonds, and the purposes for which they were to be issued. The notices of election for the water works bonds was as follows:

> "Said special election will be held for the purpose of submitting to the taxpayers, as defined by Sections 468 and 469 of the Revised Codes of Montana of 1907, who are also possessed of the qualifications of electors in said City of Bozeman, the question of the said city issuing Water Works Bonds upon the credit of the said city in the sum of $235,000.00, the proceeds from the sale thereof to be used as follows: $100,000.00 for redeeming the present outstanding Water Works Bonds and the balance in extending, improving and enlarging the present water works system and acquiring an auxiliary or additional water works system from Bozeman Creek for the City of Bozeman." (Record, pp. 5, 6.)

The bonds were sold at public auction, and the appellees being the highest and best bidders, were awarded the bonds, and thereupon deposited two certified checks for $2,000 each, as security for their completing the purchase of the bonds. A

written agreement was entered into between the appellants and appellees, a copy of which is set out in the bill of complaint (Record, p. 12), in which it was provided that if upon examination the appellees asserted that the proceedings leading up to the issuance of the bonds were illegal, they must establish such illegality; that if the proceedings were, in fact, legal, and the appellees refused to accept the bonds, then the appellant the City of Bozeman was to retain the amount of the certified checks as liquidated damages; but, if the proceedings were, in fact, illegal, then the appellees were to be under no obligation to take the bonds, and the checks which they deposited were to be immediately returned to them.

No complaint was made by appellees in their bill of complaint, or elsewhere, as to the legality of the proceedings at the election, or that the bonds were not authorized by a majority of the votes cast. The proceedings subsequent to the election, having to do with the issuance of the bonds, were also not questioned by them. The appellees, however, refused to accept the bonds, claiming that they were illegal for the reasons set forth in the bill of complaint (Record, p. 18), as follows:

> "(a) That at the time of the submission of the question of the issuance of said bonds to the taxpayers affected thereby said City of Bozeman was indebted in excess of three per cent of the taxable value of the property of said city as the same appeared upon the assessment roll of said city for the year 1915, which fact will more fully appear by reference to the financial statement of said city attached hereto and heretofore referred to as Exhibit E; that the question of extending the limit of indebtedness of said city for the purpose of procuring a water supply or the construction of sewers in excess of the three per cent limit of the taxable property and within the limit of ten per cent of the taxable property, as

provided by the Constitution of the State of Montana, was never submitted to the taxpayers affected.

"(b) That the issuance of the $235,000 of Water Works Bonds and $70,000 of Sewer Bonds would in fact increase the indebtedness of said city beyond the thirteen per cent limit of indebtedness as fixed by the Constitution of the State of Montana, assuming that the question of extending the limit of indebtedness beyond the three per cent limit had been properly submitted to the taxpayers.

"(c) That the question of the issuance of the $235,000 of Water Works Bonds, of which $100,000 were to be used for funding bonds and $135,000 for the construction of additions to the water supply, was a double question, and was submitted to the taxpayers of said city as one question, and that the taxpayers affected thereby were never permitted the opportunity of expressing their will upon the two separate questions."

The cause came on for trial before the Honorable George M. Bourquin, District Judge, at Helena, Montana, on January 10, 1917. (Record, p. 82.) Thereafter on February 13, 1917, the court entered its finding in favor of the appellees, and filed a memorandum decision (Record, p. 72), holding the issue of bonds illegal upon the first ground stated above, to-wit: that the notices of election were insufficient in that the question of extending or exceeding the three per cent limit of indebtedness was not submitted to and voted upon by the electors. The court did not discuss the other grounds of illegality alleged, but indicated in his opinion that they were, in part, at least, untenable. A decree (Record, p. 75), was accordingly entered in favor of the appellees, directing the return of the certified checks deposited with the appellant City of Bozeman.

The testimony taken at the trial, though brief, is pertinent only to the other grounds of alleged illegality. The questions

presented by the decision of the lower court are law questions, based upon the reading of the notices of election.

SPECIFICATION OF ERRORS.

I.

The District Court for the District of Montana erred in holding that the question of the City of Bozeman incurring bonded debts extending or exceeding the three per cent limit was not submitted to and voted upon by the electors of said City for the reasons:

(1) Under the laws of Montana the question to be submitted, and which was submitted, was whether the bonds should be issued, and in voting in favor of issuing the bonds, the electors thereby voted to extend the three per cent limit.

(2) The statutes of Montana define how the question of extending or exceeding the three per cent limit of indebtedness of cities for water and sewer purposes shall be submitted to the electors, the form of submission being prescribed in Secs. 3454, et. seq., Rev. Codes of Mont. of 1907.

(3) The questions to be voted upon by the electors, as stated in the Council's resolutions to submit to such electors the question of said bonds, the notices of election, the ballots and the subsequent ordinances for the issue of the bonds, conformed to and complied with the provisions of said statutes.

II.

The said District Court erred in holding that the issues of bonds in question herein, to-wit, the water works bonds of said city aggregating $235,000, and the sewer bonds of said city aggregating $70,000, would be or were illegal, for the same reasons.

III.

The said District Court erred in finding for the appellees and against the appellants, for the same reasons.

IV.

The said District Court erred in making and entering its decree herein on February 14, 1917, in favor of the appellees and against the appellants, for the same reasons.

ARGUMENT.

I.

The question to be submitted, and which was submitted, was whether the bonds should be issued, and in voting in favor of issuing the bonds, the electors thereby voted to extend the three per cent limit.

It will be observed that the lower court held that the notices of election should have submitted the proposition as to whether the three per cent debt limit should be extended or exceeded for the purpose of issuing the bonds, and were fatally defective for not doing so. It is not contended by appellees that there should have been two separate elections, (1) for the purpose of taking the will of the electors as to whether the debt limit should be extended beyond three per cent for the purpose of issuing the water and sewer bonds, and (2) for the purpose of obtaining a vote on the question as to whether the bonds should be issued; nor is it claimed that these questions should have been separately stated in the notice of election, or upon the ballot. It is only insisted by appellees, and held by the District Court, that the notices of election, to have been legal and valid, must have advised the electors that

the three per cent limit was to be extended, if the proposed bonds were issued.

The Constitution of Montana, Art. XIII, Sec. 6, provides as follows:

> "No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void. Provided, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

Pursuant to this constitutional provision, the Legislature, (Rev. Codes of 1907, Sec. 3259, Sub.-div. 64) has conferred upon city councils the power:

> "To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to-wit: erection of public buildings, construction of sewers, bridges, water works, lighting plants, supplying the city or town with water by contract, the purchase of fire apparatus, the construction or purchase of canals or ditches and water rights for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds; provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not at any time exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by

the last assessment for State and County taxes, provided, that no money must be borrowed on bonds issued for the construction, purchase or securing of a water plant, water system, water supply or sewerage system, until the proposition has been submitted to the vote of the taxpayers affected thereby of the city or town and the majority vote cast in favor thereof, and further provided, that an additional indebtedness shall be incurred, when necessary, to construct a sewerage system or procure a water supply for the said city or town which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt; the additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per cent, heretofore referrd to, of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for State and County taxes; and, provided further, that the above limit of three per centum shall not be extended, unless the question shall have been submitted to a vote of the taxpayers affected thereby and carried in the affirmative by a vote of the majority of said taxpayers who vote at such election."

In the opinion of the District Court, it is said:

"Although the statute does not define how the question shall be brought home to the electors, it is intended to subserve a useful purpose, and contemplates an intelligent vote by an electorate having knowledge that it is to determine not only that a bonded debt shall or shall not be incurred, but also that it is a proposed bonded debt extending or exceeding the three per cent limit. *The question that the statute directs shall be submitted is not, shall the city incur a bonded debt, but is, shall the city incur a bonded debt extending or exceeding the three per cent limit?* To vote for the first is not to vote for the last. Electors would vote for the first encumbering their property not more than three per cent, who would not vote for the last, incumbering it more than three per cent. And notice to vote upon the question of proposed bonded

> debts is not notice to vote upon the question of proposed bonded debts extending or exceeding the three per cent limit." (Record, p. 75.)

Thus the court interprets the language of the constitutional provision "that the Legislative Assembly may extend the limit mentioned in this section by authorizing municipal corporations *to submit the question* to a vote of the taxpayers affected thereby" and the language of the statute, above quoted, "that the above limit of three per cent shall not be extended unless *the question shall have been submitted* to a vote of the taxpayers affected thereby" to mean that the *question* referred to is the question of extending the debt limit. If the language of these provisions is to be thus taken literally, it would seem to result that the only question to be submitted is, shall the debt limit be extended, and that it would be left to the council to deal with the question as to what it would do in the way of creating the indebtedness after the limit was thus extended.

This interpretation, however, does not give effect to the language of the Constitution, that the *legislative assembly may extend the limit;* and ignores the provisions of Section 3455, Revised Codes of Montana, which prescribes the form of submission. This view, moreover, is in conflict with the interpretation of these provisions which has been adopted by the Supreme Court of Montana.

In the case of *Carlson v. City of Helena*, 39 *Mont.* 104, it was contended that the power of a city to incur an indebtedness does not embrace authority to issue bonds, and that there must be a submission of the two questions to confer authority upon the city to make a valid issue of bonds. The court, at page 104, said:

> "It is said that the authority of the city to incur an indebtedness does not include an authority to issue bonds,

> and therefore that two elections were necessary to authorize the proposed issue, (1) to extend the limit and incur the indebtedness, and (2) to issue bonds. It is not necessary to inquire whether the power conferred upon a municipality to incur indebtedness does not imply the additional power to issue evidences thereof, in the form of negotiable securities. Here the authority is expressly given. The Constitution does not prescribe the mode by which the legislature may authorize submission to the taxpayers of the question whether an indebtedness shall be incurred. The legislature, therefore, was free to prescribe such method as it chose. The method of procedure and the form of the question to be submitted by the council are prescribed in Sections 3454, et. seq., Revised Codes. The form of the submission requires the electors to vote 'Yes' or 'No' upon the question whether bonds shall be issued; so that, in voting upon this question, they authorize the debts to be incurred by the issuance of the bonds. The contention must be overruled."

In the later case of *Arnold v. Miles City, et al*, 46 *Mont.* 481, the court said:

> "When the taxpayers of Miles City voted in favor of issuing bonds to construct a sewerage system and procure a water supply, they thereby voted to extend the three per cent limit for those purposes, and the limit was thereby extended."

The opinion was expressed in the decision of the lower court that this question has not been passed upon by the Supreme Court of Montana. Such also seemed to be the position of appellees in the court below, as the only case cited by them in this connection was the *Carlson* case, above, and while it was not urged that this was an authority in support of their contention, it was suggested that this case presented a method of submitting the question involved which had been approved by the Supreme Court of Montana, because in that case the notice stated that the election was to be held "for the

purpose of ascertaining the will of the taxpayers to be affected thereby, and that authority may be given and power conferred upon the city council to increase the indebtedness of said city over and above the three per cent limit fixed by law by the issuance" of the bonds described therein.

It is submitted that the language of the court in the *Carlson* case, as well as in the later case of *Arnold v. City of Miles City*, is not to the effect that the question of extending the limit of indebtedness must be submitted, but quite clearly indicates the view that such submission is not necessary.

As stated above, it is not contended by appellees, nor did the lower court hold, that there should be a separate submission, even at the same election, of the question of extending or exceeding the debt limit, but only that the question of extending or exceeding the debt limit shall be coupled with the question of issuing the bonds for the information of the elector, and as a part of the question to be voted upon.

It would seem that if the question of extending the three per cent limit of indebtedness were a question in itself, and one which must be presented to the electors, it should be presented to them as a separate question so that they might vote upon it separately. In the *Carlson* case, the Supreme Court of Montana does not say that the submission of the question of extending the debt limit as a part of the question to be voted upon saved the notice of election, and made the proceedings valid. The court does not intimate that the inclusion of that question had any effect upon the validity of the notice, or that the fact of such inclusion in any way influenced its opinion. In that case the court squarely held, not only that two elections were not necessary, but that the question of issuing the bonds included the question of extending the limit

of indebtedness for the purpose, without being stated; that the legislature was free to prescribe such form of submission as it chose, and that the method which it had prescribed was the one to be followed. The legislature has not required that the question of extending the limit of indebtedness shall be submitted, either as a part of the main question of issuing the bonds, or as a separate submission.

But even if it can be said that the *Carlson* case goes no farther than to hold that no separate submission need be made of this question, we yet submit that the court disposed of the question as it is here raised, because it is, in effect, the same question; and furthermore, that in the *Arnold* case, the language used is so unequivocal as to leave no room for doubt.

The holding of the lower court, and the contention of appellees as to the question to be submitted, seems to rest solely upon the argument that the elector is entitled to know—and that the constitutional and statutory provisions quoted above intend that he shall be informed—that the creation of the proposed indebtedness will involve an increase or extension of the existing municipal indebtedness beyond the three per cent limit; that, knowing that the indebtedness to be incurred would exceed the three per cent limit, the voter might oppose a proposed bond issue which otherwise he would favor.

Manifestly, this argument attaches altogether too much significance to the setting of the limit for general purposes at *three per cent.* The three per cent limit is an arbitrary one established by the constitution for the sole purpose of preventing cities and towns from indulging in extravagance in municipal expenditures, beyond current revenues. It declares that to be a sufficient latitude for indebtedness for general purposes, but regards water and sewer facilities of such great

value to a community that it not only permits additional indebtedness for these purposes, but refrains from setting any limit to the increase to be allowed, leaving it to the legislature to set such limits, with the consequent result that such limits may be easily changed from time to time.

It is submitted that the proper interpretation is that the framers of the constitution intended to charge themselves and the legislative assembly only with the duty of establishing limits to operate as restraints upon the cities and towns, and left it to the electors to approve or disapprove of the creation of any particular indebtedness within those limits. In other words, that the *limits* are set by the constitution and statute, and that the voter has nothing to do with them; but that the question of *incurring indebtedness*, within those limits, is left to be determined by the cities and towns, through their councils and electors.

So far as the elector is concerned, there can be no special reason why he should be advised only when the three per cent limit is being exceeded, and then be given information of the bare fact itself. If we are to assume that he should be informed on the subject—and that the constitution and statute requires that he should be—it is evident that if the information is to be of any value to him, or serve any purpose, he should be informed in each instance as to the percentage of debts then outstanding, and the exact percentage of the proposed increase or extension. From his point of view, he would be as much concerned to know that the proposed debt would exceed two, four or six per cent of the value of property in his community as to know that it would exceed three per cent thereof. But, as a matter of fact, percentages would mean little or nothing to him, and the constitution and statute do not

either declare or imply that they shall be presented to him. What the elector is interested in knowing is how much money is to be borrowed, and for what particular municipal improvement—and that is what the constitution and statute have required shall be submitted to and voted upon by him. The question of creating the particular indebtedness, and not of extending the debt limit, is the vital and important thing.

Cases involving the precise point under consideration, so far as our search discloses, have been exceedingly rare. While the courts have frequently considered the question as to whether the particular submission under review involved more than one purpose, which should be voted upon separately by the electors, they do not seem to have regarded this point as important, and in almost all of the cases it will be found that the submissions have simply stated in concise terms the amount and purposes for which bonds are to be issued, without mention of the fact that any debt limit was to be exceeded.

In the case of *Kerlin v. City of Devils Lake*, 141 *N. W.* 756, (*N. D.*), the question was raised, although in a different way from that in which it is presented here. The ballot submitted two questions: (1) whether the debt limit should be increased as authorized by the constitution and statute; and (2) whether bonds therefor in an uncertain amount "not to exceed $33,000" should be issued, all for the purpose expressed of "establishing a municipal light plant and paying therefor." It was held that the constitution and statutes in that state contemplate two separate elections, although they may be consolidated and held as one, when a separate vote on each question is permitted. (It will be seen that this decision is in direct conflict with the *Carlson* case, in which the contrary is held to be the law in Montana.) The court held

that the amount must be certain, and that the uncertainty resulting from the use of the words "not to exceed $33,000" vitiated the election on that question. The court then considered the question as to whether this would invalidate the election on the other question submitted to it, and held that it would not. In discussing the latter question, the court used the following language, which seems to be directly in point here, although opposed to the assumption of the court that the questions should be separately submitted:

> "Every voter was charged by law with knowledge that the primary purpose of the election was to increase the debt limit, and must have known, as a matter of law, that without that increase no bond issue could be authorized. Hence the bond issue, being dependent for validity wholly upon the constitutional increase of the debt limit, in no wise could affect the decision of or influence the voters in voting upon the question of whether the constitutional increase should be had or not. *To illustrate, if the voter was in favor of the issuance of the bonds, he must also be in favor of increasing the debt limit, otherwise we must presume him to be ignorant of the law.* So, too, if the voter be favorable to both issuance of bonds and increase of the debt limit he has but expressed his opinion when he votes affirmatively on both propositions at once."

In the case of *City of Oxnard v. Bellah*, 130 *Pac.* 701, (*Cal. App.*), the submission was similar to that in the case at bar, the proposition being "Shall bonds of the City of Oxnard in the sum of $30,000 be issued for the purpose of the acquisition, construction and completion by said City of Oxnard of a certain municipal improvement, to-wit, a municipal lighting system?" The court held that it was not necessary to separately submit the proposition of incurring a debt—that the authority to issue the bonds necessarily carried with it the authority to incur the indebtedness.

II.

The Statutes of Montana Define the Method of Submitting the Question of Extending or Exceeding the Three Per Cent Limit of Indebtedness of Cities for Water and Sewer Purposes to the Electors.

In the *Carlson* case, supra, the Supreme Court of Montana, after pointing out that the Constitution of Montana does not prescribe the mode by which the legislature may authorize the submission to taxpayers of the question whether an indebtedness shall be incurred, but left the legislature free to prescribe such method as it chose, said:

> "The method of procedure and the form of the question to be submitted by the council are prescribed in Sections 3454, et. seq., Revised Codes. The form of the submission requires the electors to vote 'Yes' or 'No' upon the question whether bonds shall be issued; so that in voting upon this question they authorize the debt to be incurred by the issuance of the bonds."

Section 3455, of the Revised Codes of Montana of 1907, which prescribes the form and method of giving notice of an election upon the question of issuing bonds, provides in part as follows:

> "The notice must state the time and place of holding the election, the amount and character of the bonds proposed to be issued, and the particular purpose therefor."

It is difficult to perceive how the court could have more explicitly expressed its interpretation of the constitution and statutes on this subject, or more completely decided the question as to the sufficiency of the notice of election which is here raised.

When the legislature has prescribed the mode by which a given power is to be exercised by a municipality, this mode must be pursued.

Shapard v. City of Missoula, 49 Mont. 269, 141, Pac. 547;
Missoula St. Ry. Co. v. City of Missoula, 47 Mont. 95, 130 Pac. 773.

III.

From what has been said above, it is respectfully submitted that the notices of election, a copy of which is set out above, fully complies with the requirements of Sections 3454, et. seq., of the Revised Codes of Montana.

IV.

Specifications of Error Nos. II, III, and IV do not require separate treatment, but involve the same propositions as those presented above, and the argument need not be repeated. If the court erred in holding that it is necessary to submit the question of exceeding or extending the debt limit, it would follow that the court was in error in holding the bond issues illegal, and in finding in favor of appellees, and in making and entering its decree in their favor.

It is submitted that the form of submission of the question of issuing the bonds involved herein in the notices of election conformed to the Constitution and statutes of Montana; that the bonds as issued were legal and valid; that the appellees should have accepted them under their contract; and that the decision and decree of the lower court should be reversed with instructions to enter a decree in favor of the appellants.

Respectfully submitted,

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